United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
Appellees.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
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vs.

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
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SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,
Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., ET AL.,
Appellees.

Appellants' Brief as to Claim that there was a Nineteenth Heir of Luis Maria Baca, named Antonio.

HERBERT NOBLE,
Of Counsel for Watts and Davis.

SAMUEL L. KINCAID,
HARTWELL P. HEATH,
Solicitors for Watts and Davis.

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Of Counsel for Bouldins.

JOHN H. CAMPBELL,
Solicitor for Bouldins.

JAMES W. VROOM,
Of Counsel for Santa Cruz Development Company.

G. H. BREVILLIER,
Solicitor for Santa Cruz Development Company.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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SANTA CRUZ DEVELOPMENT COMPANY, a Corporation, Appellant, v. CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., *et al.*, Appellees.

APPELLANTS' BRIEF AS TO THE CLAIM THAT THERE WAS A NINETEENTH HEIR OF LUIS MARIA BACA, NAMED ANTONIO.

Statement of the Case.

These are cross-appeals (rec., p. 404) by Cornelius C. Watts and Dabney C. T. Davis, Jr., plaintiffs below, and the Santa

Cruz Development Company and James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin, defendants below, from that portion of the decree of the court below entered herein November 1, 1915 (rec., p. 536), that recognizes the title of Joseph E. Wise and Margaret W. Wise, defendants below, to an undivided one-thirty-eighth each of the land, the title to which is sought to be quieted in this action.

The action was brought in the District Court of the United States for the District of Arizona to quiet the title to a certain tract of land situated in Santa Cruz County, State of Arizona, particularly described in the complaint (rec., pp. 3-25).

The plaintiffs below, Watts and Davis, claim title to the south half of said land as successors in title to one John S. Watts, to whom they claim that the heirs of Luis Maria Baca, to whom the United States by act of Congress of June 21, 1860, granted the land, conveyed it; and the defendants below James E. Bouldin, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin claim the north half of the land by the same line of title; and the defendant below, Santa Cruz Development Company claims under John S. Watts but principally by a different line of title.

The defendants below, Joseph E. Wise and Margaret W. Wise, claim, among other things, that there was another heir of Luis Maria Baca, named Antonio Baca or Jose Antonio Baca, whose interests were not conveyed to Watts, and that they are the successors in title to said Antonio, whose interest was an undivided one-nineteenth (rec., pp. 63, 64).

The Court below found in favor of this claim of the defendants Wises; and from that portion of the decree these appellants appeal.

The history of the grant is set out under Point II, *infra*.

This brief is filed jointly on behalf of those who oppose the claim that there was a nineteenth heir of Luis Maria Baca named Antonio entitled to inherit; and will be confined strictly to that one question.

The parties on whose behalf this brief is filed are also filing separate briefs on the main appeals in which their interests are diverse, and in those briefs the general features of the case are treated.

Specification of Errors.

The assignment of errors of the appellants, Cornelius C. Watts and Dabney C. T. Davis, Jr., and the Bouldins are set out at length in the record (pp. 581, 602) and may be grouped as follows :

Error is alleged in the decree below so far as it recognizes title in Joseph E. Wise and Margaret W. Wise each to an undivided one-thirty-eighth interest in the land and quieted the title thereto in them ; and so far as such decree did not find the title to the south half of the land in Watts and Davis and the north half to the Bouldins and did not adjudicate that neither Joseph E. Wise nor Margaret W. Wise had any title to the land or to any part thereof.

Error is alledged in the admission of certain deeds on the ground that the grantors in said deeds were not shown to have had any interest in the land at the time of such conveyances for the reasons specifically set out in the assignments.

Error is alleged in admitting and not excluding the testimony of Marcos C. de Baca as to alleged statements of Prudencio, Tomas, Manuel and Domingo Baca as to the relationship of Antonio Baca to Luis Maria Baca on the grounds, among others, that such statements were not made *ante litem motam ;* that the declarants had executed deeds previously by which they purported to convey the title to the whole tract ; that such deeds contained recitals and covenant that the grantors in said deeds were all the heirs of Luis Maria Baca.

Error is alleged in rendering judgment for Joseph E. Wise and Margaret W. Wise on the ground that it was clearly

against the weight of the evidence and that there was no competent evidence to support it.

Error is alleged in admitting the testimony of Marcos C. de Baca as to the statements of Prudencio, Tomas, Manuel and Domingo Baca on the ground that each of said persons covenanted in the deed under which these appellants and Joseph E. Wise claim that they were seized in fee and had good right to convey the land and neither Antonio nor his heirs were mentioned in said deed.

Error is alleged in admitting the testimony of Marcos C. de Baca as to the statements of Prudencio, Tomas, Manuel and Domingo Baca on the ground that they were in derogation of the title conveyed by said persons to the predecessors in title of these appellants and made subsequently to the transfer of title.

Error is alleged in admitting the alleged will of Luis Maria Baca, the petition of the executor accompanying the will and an order referring the petition to an Alcalde for hearing on the grounds, among others, that they did not tend to prove any issue in the case, that they showed that Luis Maria Baca had a deceased son, that such deceased son had received advancements and was not entitled to inherit, that it does not appear that the adjudication was in favor of the heirs of the alleged Antonio, and that the act of June 21, 1860, granted the land to the heirs of Luis Maria Baca who made claim to the Las Vegas grant and that no claim to said grant was presented on behalf of the alleged Antonio nor of his heirs.

The Santa Cruz Development Company assigned the same errors (rec., p. 623), except that it does not join in assigning error as to the portion of the decree which did not find the title to the south half of the tract in Watts and Davis and the title to the north half in the Bouldins.

POINTS.

I.

There is no proof that Luis Maria Baca had a nineteenth heir named Antonio, entitled to inherit; and there is proof that he had only eighteen heirs.

An examination of the record shows that the claim as to Antonio rests solely and entirely on the testimony of the witness Marcos C. de Baca as to what was told him by certain sons of Luis Maria Baca.

There is not a bit of writing produced in which the name of Antonio appears, except certain lists and deeds prepared by Marcos himself. A certified copy of what purports to be the Will of Luis Maria Baca, a petition of Baca's executor and an order referring the petition to an Alcalde was produced, but no mention of Antonio is to be found in them.

Contradiction of Baca's Testimony.

A petition (Santa Cruz Development Company, Exhibit 1, rec., p. 403) was filed by John S. Watts, on behalf of the heirs of Luis Maria Baca, June 19, 1855, with the surveyor general for the confirmation of the Las Vegas grant under the direction and from information furnished by Tomas Cabiza de Baca, the father of Marcos (rec., pp. 329, 375), and grandson of Luis Maria Baca (rec., p. 330), by whom he (Watts) was employed (rec., pp. 353, 375). Tomas had for a long time been working on the claims (rec., p. 351), and up to 1873 and 1875 acted as agent for the Baca heirs (rec., p. 374). When in New Mexico, Watts made his home at the house of Tomas de Baca (rec., p. 375). This petition gives the names of the sons of Luis Maria Baca,

who were living and the representatives of those who were dead, but makes no mention of Antonio.

The petition (Plaintiff's Exhibit E, rec., p. 165) filed later, October 17, 1856, in reference to the Ojo del Espiritu Santo grant by the same John S. Watts on behalf of the heirs of Luis Maria Baca gives a list which it declares to be all the living children and grandchildren of Luis Maria Baca, and there is no mention therein of Antonio or any descendants of his.

On May 1, 1864, a deed was made to the same John S. Watts (Plaintiff's Exhibit C, rec., p. 154) by various Bacas, including the father of Marcos, but it makes no reference to Antonio or any descendants of his.

On May 30, 1871, another deed (Plaintiff's Exhibit O, rec., p. 197) was made to the same John S. Watts by the heirs of Luis Maria Baca, including the father of said Marcos, who Marcos testified was a truthful, honest man and that he would believe anything he told him (rec., p. 363), in which deed there was a covenant that the grantors were "the sole lawful heirs of Luis Maria Baca", but there is no Antonio or any descendents of his mentioned in that deed.

The petitions, presented to the surveyor general as to the Las Vegas and Ojo del Espiritu grants, were both supported by the testimony of persons who knew Luis Maria Baca and his children (Plaintiffs' Exhibit F, rec., p. 169, Santa Cruz Development Company Exhibit 2, rec., p. 405). Among them was Jose Francisco Salas. He testified that he had examined the lists set forth in said petitions and that they were correct lists of the names of all the children of Luis Maria Baca then living; also of the heirs of those that were dead; but such lists did not include Antonio nor any legal representatives of his.

Here, therefore, is a claim of title under a man who was dead in 1827 (rec., pp. 339, 376), when Luis Maria Baca died (rec., p. 338). On whose behalf no claim was made when

the interest in this land of the heirs of Luis Maria Baca was disposed of to Watts, either on May 1, 1864, or May 30, 1871, when the deeds (Plaintiffs' Exhibit C, rec., p. 154; Plaintiffs' Exhibit O, rec., p. 197) were executed. On whose behalf claim was never made until this litigation was pending, and the defendant, Joseph E. Wise, went to Mexico and retained Marcos (rec., p. 371). Marcos then, for a consideration (rec., p. 372), procured deeds to himself from, as he says, reputed heirs of Luis Maria Baca (rec., p. 372), and then conveyed such interest to the defendants, Wises (rec., p. 261). This claim rests entirely on the unsupported testimony of Marcos, the persons from whom he got the deeds not even being produced to tell their story.

Joseph E. Wise is Estopped to Assert the Heirship of Antonio.

So far as the defendant below, Joseph E. Wise, is concerned, the whole of the testimony of Marcos C. de Baca is inadmissible for the reason that said Wise claims an undivided two-thirds interest in the whole tract under the deeds (Plaintiffs' Exhibit C, rec., p. 154; Plaintiffs' Exhibit O, rec., p. 197) through the instrument dated September 30, 1884 (rec., p. 372) from the heirs of John S. Watts to David W. Bouldin and can not therefore attack the title conveyed by the deeds to John S. Watts by grantors who covenanted that they were all the heirs of Luis Maria Baca and were seized in fee and had good right to convey the same.

Objection on this ground was seasonably made and an exception taken (rec., p. 331).

Watts and Davis, the Bouldins and the Santa Cruz Development Company and Joseph E. Wise all claim under a common source of title, that is the deeds from the heirs of Baca to John S. Watts, dated May 1, 1864 (Plaintiffs' Exhibit

C, rec., p. 154) and May 30, 1871 (Plaintiffs Exhibit O, rec., p. 197).

The rule is well established that where two persons claim under a common grantor, neither can attack the title of the common grantor or deny that he had a valid title at the time of the conveyance.

In *Robertson v. Pickrell*, 109 U. S., 608, the Court quotes from *Blight's Lessee v. Rochester*, 7 Wheat., 535, at 548, as follows (p. 615) :

> " The property having become by the sale the property of the vendee he has the right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this nor is either the letter or spirit of the contract violated by it."

And the Court then continues (p. 615) :

> " To this general statement of the law there is this qualification : That a grantee can not dispute his grantor's title at the time of the conveyance so as to avoid the payment of the purchase price of the property ; nor can the grantee in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by another. In other words he can not assert that title obtained from the grantor or through him is sufficient for his protection and not available to the contestant. When both parties assert title from a common grantor neither can deny that such grantor had a valid title when he executed the conveyance."

Attention is called to the fact that as to the two-thirds interest Joseph E. Wise claims solely under the instrument (rec., p. 272), from the heirs of Watts to Bouldin ; that he makes no claim to have acquired from another source any title to the two-thirds. The contention is that this being so he can not set up a title derived from another source which derogates from

the title to a part of the two-thirds and at the same time claim the remainder of the two-thirds under the title derived from the heirs of Watts.

In *Minor v. Powers*, 26 S. W., 1071, 1072; 87 Tex., 83; the Court said (p. 89):

> "Both parties claim under a deed from persons claiming to be the only heirs of Walsh, and in that deed they were so recited to be. Defendants can not claim under this deed as from the only heirs of Walsh and deny the truth of the recitals as to the plaintiff."

The foregoing might have been written of the case at bar; it is so apt in its application to the facts, since, in the deed of May 30, 1871, from the Baca heirs to Watts, the grantors covenanted that they were all the heirs.

Other cases supporting the same proposition are:

Gibson v. Lyon, 115 U. S., 447.
Bethea v. Allen, 95 S. C., 479, 484; 79 S, E., 639.

Testimony of Marcos C. de Baca.

Marcos C. de Baca testified that at the time of the hearing, March, 1915, he was fifty-eight years old (rec., p. 329), a lawyer admitted to practice in the District Court of New Mexico in 1889 and in the Supreme Court in 1891 (rec., pp. 329, 371); that he was a great grandson of Luis Maria Baca (rec., p. 329) being a son of Tomas Cabeza de Baca who was a son of Juan Antonio Cabeza de Baca (rec., p. 330) that his father's full name was Francisco Tomas Cabeza de Baca which he sometimes signed Francisco and sometimes Tomas (rec., p. 330) that his father was a party to the deed of May 1, 1864 (Plaintiffs' Exhibit C, rec., pp. 154–163) and that his signature thereto was genuine (rec., p. 329); that he would believe anything his father told him as his father was an honest truthful man (rec., pp. 363, 375); that

his father told him "everything about the family" (rec., p. 347); that his father as far back as 1869 (rec., p. 351) and for a long time thereafter acted for the Baca heirs in connection with their claims to these grants (rec., p. 374); that his father was prominent among the Americans as well as the Mexicans (rec., p. 375); that John S. Watts made his father's house his home (rec., p. 375); that his father employed John S. Watts to procure the confirmation of the grants (rec., p. 353); and that he thinks his father furnished John S. Watts the information on which he acted in the matter of the Las Vegas grant (rec., p. 375).

The witness testified that since 1875 he had made a study as to who the sons of Luis Maria Baca were (rec., p. 330), that the first object of it was to keep a full record of the family and afterwards it was for the object of finding out the heirs of Luis Maria Cabeza de Baca in some partition suits brought against the heirs as to some land that Luis Maria Baca owned in New Mexico (rec., p. 330).

After it had appeared in the course of the hearing that to make declarations as to pedigree admissible they must have been made *ante litem motam*, the witness having testified that partition suits as to Baca Location No. 1 and the Ojo del Espiritu Santo grant was begun early in 1875 (rec., pp. 341, 347), the witness testified that his first conversation with his great uncle, Prudencio, one of the declarants, took place at Pena Blanca, New Mexico, in the latter part of 1873 (rec., p. 346); that he had a notion to make a book of the family record from Luis Maria Baca to the present in 1873, when he left school (rec., p. 371), being then sixteen years old (rec., pp. 347, 350, 371), and that he was not interested in the matter at all except "to keep the record of the family, that is all" (rec., p. 361), "to find out the correct list of the family of Luis Maria Baca, for my own use." "I did not have any other" object (rec., p. 374).

The foregoing indicates some of the inconsistencies of Marcos' testimony and shows his willingness to change his testimony to meet the requirements of the case.

The witness testified that he was acquainted with Prudencio Baca, Jesus Maria Baca, the first, Jesus Maria Baca, the second, Domingo Baca and Manuel Baca, sons of Luis Maria Baca, and Josefa Baca y Lucero, a daughter ; that Prudencio died in March, 1882, the two Jesuses died about 1868 or 1870, Josefa y Lucero died in 1888, Domingo died in 1892 and Manuel in 1905 (rec., p. 335) ; that in 1873 Prudencio, Manuel and Josefa lived at Pena Blanca (rec., p. 350) and the two Jesuses lived at Loma Parda in San Miguel County (rec., p. 350) ; that he had conversations with Prudencio, Domingo, Manuel and Josefa (rec., p. 336) ; and that his first conversation with Prudencio as to the relationship of Antonio to Luis Maria Baca was in the latter part of 1873 (rec., p. 346).

After objection had been made and overruled and exception taken to the witnesses' giving the substance of the conversations (rec., pp. 345, 355), on the ground that it was not shown that they were made *ante litem motam* but on the contrary it appeared that they were made *post litem motam*, the witness testified with regard to the conversation with Prudencio at Pena Blanca in 1873 " I was inquiring from him who the children of Luis Maria Baca were. He gave me the names, amongst them the name of Antonio Baca as the oldest child of of Luis Maria " (rec., p. 355).

The witness testified that he had another conversation with Prudencio ; it might have been nearly a year before the commencement of the partition suit (rec., p. 355), which he testified began early in 1875 (rec., p. 341), at which conversation witness showed Prudencio a list of the family, as he had got them, at the head of which he had the name of Antonio Lucero, sometimes called Jose Antonio, and Prudencio said that it was a correct list (rec., pp. 356, 358).

The witness testified that he had a conversation in 1875

prior to the bringing of the partition suit with Manuel Baca, a son of Luis Maria Baca, at his father's house in Pena Blanca, in which he inquired of Manual also if the list which he had made of the family of Luis Maria Baca was correct or not, and that Manuel said that it was and " that Antonio was the oldest child of Luis Maria Cabeza de Baca " (rec., p. 359).

The witness also testified that he had a conversation in 1893 or 1894 in Pena Blanca with Domingo Baca, a son of Luis Maria Baca, in which conversation Domingo said that Antonio was a son of Luis Maria Baca (rec., p. 359).

The witness, using a paper, as it afterwards appeared, copied by him from papers of his father (rec., pp. 338, 339) testified, as if of his own knowledge, that there was a controversy in 1828 or 1829 after the death of both Luis Maria Baca and the alleged Antonio Baca between Francisca Garviso, who, the witness says, was the wife of Antonio Baca, and Miguel Baca, the brother and executor of Luis Maria Baca, as to the right of her children to inherit from Luis Maria Cabeza de Baca. The witness later admitted that his knowledge about the controversy was derived from the paper (rec., p. 338) and testified that from his information the controversy was about the indebtedness of Antonio at the time of his death to his father, Luis Maria Baca (rec., p. 340); that he was not himself acquainted with Francisca Garviso (rec., p. 361); that Francisca Garviso is dead as if of his own knowledge (rec., p. 361); that in 1873 Antonio was dead as if of his own knowledge (rec., p. 362); though when criticised for so doing he testified that he had been told so by Prudencio Baca and his father and that he believed them (rec., p. 363).

After objection that Prudencio was a party to the deed containing the covenant that the grantors were the sole lawful heirs of Luis Maria Baca as was the witness' father, Tomas Cabeza de Baca, and bound thereby and could not, after

having transferred the title, make statements in derogation of the title conveyed, had been overruled and exception taken (rec., p. 362), the witness testified that Prudencio told him in 1873 that Antonio Lucero, corrected on his counsel's suggestion to Antonio, left a child, whose name was Juan Manuel Baca, that he never knew Juan Manuel, that he was told by his father, by Prudencio and by Manuel that in 1873 Juan Manuel Baca was dead, that he left a widow, Feliciana Padilla, that witness does not remember ever meeting her, that he made inquiry, without saying of whom, as to her and ascertained that she died about 1882 (rec., pp. 362–364, 366); that he knew of his own knowledge that Juan Manuel Baca left children (rec., p. 366) and that their names were Jose, a son, and Preciliana, a daughter (rec., p. 366); that he knew Jose during his lifetime and that he died in 1905, leaving children (rec., p. 366); that Preciliana married Antonio Mares, and died leaving children (rec., pp. 366, 367); and, using a list prepared by his counsel from the deeds to the witness and presumably prepared by the witness (rec., p. 368), that the persons named in the deeds were all the descendants of Jose and Preciliana Baca (rec., p. 369).

The witness used to refresh his recollection what he stated was a list of the family of Luis Maria Baca made by himself and as to which he testified that since 1875 he has been engaged in making such list, that a family tree of Luis Maria Baca was filed in the partition suit as to Baca Location No. 1, and that the list he had was a copy of it (rec., p.); that he made various lists on scraps of paper, that he does not think he any longer has the list that he claimed to have shown Prudencio but that he had copies made from it, and that the copy of the list which he had in court was made between 1880 and 1884 (rec., pp. 356, 373); that he knew who the children were by the lists that he had (rec., p. 361); that he made lists of the family from the information furnished him by others and that

the list he had in Court was a copy made by him from various other lists (rec., p. 372).

The witness testified that about 1875 he was trying to find out who were the heirs of Luis Maria Baca in connection with certain partition suits as to land owned by Luis Maria Baca (rec., p. 330); that suits for the partition of Baca Location No. 1 and of the Ojo del Espiritu Santo grant were begun early in 1875 (rec., p. 347) and that in those suits they had to prove who the heirs of Luis Maria Baca were (rec., pp. 352, 354).

The witness testified that he did not know what was the outcome of those suits, or who were found therein to be the heirs and that he had never examined the record in them (rec., p. 377).

The Question is One of Heirship Rather Than of Pedigree.

There was introduced in evidence in support of the claim that there was an heir of Luis Maria Baca entitled to inherit named Antonio, a certified copy of what purported to be the will of Luis Maria Baca accompanied by a petition of his executor who was his brother Miguel and an order referring said petition for hearing to the Constitutional Alcalde of Cochiti (rec., p. 444).

Objection was seasonably made to its introduction on the grounds of incompetency, irrelevancy and immateriality (1) because while the papers showed that Luis Maria Baca had a son who predeceased him it did not appear that he was Antonio; (2) because it appeared from the papers that the deceased son, whatever his name, had received advancements more than equal to his share of the estate and was not entitled to inherit and was not therefore an heir nor were his wife, if he had one, or his children, if he left any; (3) because it appeared from the papers that the right of the deceased son to

inherit was referred to the courts and it does not appear what adjudication was made on it, or that it was in favor of the heirs of the deceased son, if he was Antonio; and (4) because the heirs of the alleged Antonio, if there were such, did not present their claim to the surveyor general and were not included among those to whom the grant was made by the sixth section of the Act of June 21, 1860.

This objection was overruled and an exception duly taken (rec., pp. 441, 442).

There is nothing in the will to indicate in any way that Luis Maria Baca had a son named Antonio.

The portion of the papers which it is claimed tend to prove the claim that Antonio was an heir of Luis Maria Baca are the following allegations of the petition of the executor:

> "But as in this matter Franco Garviso, who was the wife of a son of my deceased brother, has been willing to make trouble claiming an equal part with other heirs, and being I instructed by my deceased brother, and appearing for the lists in the business the charge to the referred son of my brother, he has been satisfied of all his patrimony fatherly and motherly with great advantage to the others, out of the mentioned charge."

Properly expressed the foregoing means that the executor had been instructed by his deceased brother and the books showed that the deceased son had been advanced all of his share of the estates both of his father and mother.

The question whether this allegation was true was referred to the Constitutional Alcalde of Cochiti to hear both parties and pass judgment according to justice, upon the principle that if the deceased son received an advancement during life it should be deducted from what he would otherwise be entitled to out of his father's estate (rec., pp. 447, 452).

No evidence was offered to show what the result of the

hearing was or that it was in favor of the claim of said Garviso.

It could not be said that this proved that the deceased son was an heir, or, if an heir, that he was entitled to inherit. The most that these papers can be claimed to prove is that there was a son who predeceased his father.

From these papers there was nothing to show that the deceased son's name was Antonio, so that it is only by the testimony of Marcos C. de Baca as to the statements of Prudencio, etc., that this deceased son is connected with Antonio.

If the deceased son was Antonio, then it is fair to assume that it was decided that he was not entitled to inherit from his father Luis Maria Baca, since neither in the petition filed by John S. Watts under the employment and direction and upon information furnished by Tomas Cabeza de Baca, a nephew of such deceased son, acting as agent for the heirs of Luis Maria Baca, with the surveyor general as to the Las Vegas grant nor in the amended petition presented by the same Watts under similar conditions to the surveyor general in regard to the Ojo del Espiritu Santo grant nor in the depositions in support of those petitions is Antonio or any of Antonio's descendants mentioned among the heirs of Luis Maria Baca. Further, neither he nor any of his descendants appear nor is any reference made to them in either of the deeds from the heirs of Luis Maria Baca to John S. Watts, dated May 1, 1864, and May 30, 1871, though several of his brothers were parties to such deeds, and in the latter it is covenanted that the grantors are the sole lawful heirs of Luis Maria Baca.

If the contention under Point II., *infra*, is sound that the claim on behalf of Antonio not having been presented to the Surveyor General, Antonio was not included in the grant made by the Act of June 21, 1860, this evidence was clearly inadmissible.

No claim is made, nor do the declarations of Tomas,

Prudencio, Domingo or Manuel, purport to state that Antonio was an heir of Luis Maria Baca. In other words such declarations were not offered nor could they have been offered to prove heirship, except so far as the fact of his being a son might bear on that question.

The burden of proving that there was an heir of Luis Maria Baca, named Antonio, entitled to inherit was on the defendants, Wises. The foregoing falls far short of sustaining this burden.

On the Question of Pedigree, such Declarations Were Inadmissible on the Following Grounds:

(1) The declarations being made *post litem motam* were inadmissible not being within the pedigree rule.

(2) Tomas Cabeza de Baca, Prudencio Baca, Domingo Baca and Manuel Baca being grantors in said deeds, their declarations made after they had transferred the title in derogation thereof were inadmissible.

(3) Tomas Cabeza de Baca, Prudencio Baca, Domingo Baca and Manuel Baca were parties to said deeds and bound by the recitals and covenants thereof and estopped from contradicting them.

(4) Marcos C. de Baca having acquired the title which he afterwards conveyed to the Wises (rec., p. 261) was bound by the covenants and recitals in the deeds of his ancestor, Tomas Cabeza de Baca, and estopped from denying that the grantors therein were all the heirs of Luis Maria Baca.

Objection on the foregoing grounds was seasonably made and exception duly taken (rec., p. 364).

The first and second grounds of objection may be grouped for discussion. The deed of May 30, 1871 (Plaintiffs' Exhibit O, rec. p. 197), to which Marcos C. de Baca's father, Thomas Cabeza de Baca, Prudencio, Domingo and Manuel Baca were all parties, contained covenants (1) that the grantors

were the sole lawful heirs of Luis Maria Baca, were seized in fee of the land and had good right to convey the same; (2) that John S. Watts, his heirs and assigns should have quiet and peaceable possession; and (3) that the grantors warranted the title against the claims of the heirs of Luis Maria Baca and all persons claiming to be such heirs.

The grantors were bound by these covenants and estopped to deny them; and when Marcos C. de Baca, the descendant of Tomas, acquired the title it inured to his father's grantees and Marcos was also bound and estopped.

"The estoppel works upon the estate and binds the after acquired title as between parties and privies."

Van Rennselaer v. Kearney, 11 How., 297, 325.

As to the Second Ground of Objection, it is Well Established that the Declarations of Grantors Made After the Transfer of Title in Derogation of the Title Transferred are not Receivable.

The following cases support the proposition that the declarations of a grantor after the transfer of title in derogation of the title conveyed by him are not admissible:

West v. Houston Oil Co., 136 F., 343, 348; 69 C. C. A., 169;
People v. Storrs, 207 N. Y., 147; 100 N. E., 730;
Conkling v. Weatherwax, 181 N. Y., 258; 73 N. E., 1028;
Jones v. Tennis Co., 94 S. W., 6;
Lang v. Metzger, 206 Ill., 475, 489; aff'g 101 Ill. App., 308;
Leonard v. Fleming, 13 N. D., 629; 102 N. W., 308;
Gowdy v. Gowdy, 83 S. C., 349; 65 S. E., 385.

Wigmore says (Section 1085): "Under the general principle (*ante*, 1080), statements made by the transferor of realty or personalty after the transfer of title are not receivable as

admissions against interest. This much is never disputed in the general application of the principle. There may, however, be other principles of evidence upon which such statements can be brought in; these are pointed out (*post*, 1087)."

Section 1087 does not mention declarations as to pedigree or the rule under which such declarations are admitted as one of the " other principles of evidence " to which Wigmore refers; and no case has been found which makes such declarations an exception to the general rule as to declarations of a grantor made after the transfer by him of the title in derogation of the title conveyed.

On the other hand, on principle, it would seem that declarations as to pedigree, if they serve to derogate from a title previously conveyed by the declarant, should not be admissible (1) because so far as they cut down the title of declarant they are not against interest and, under the general rule as to such statements, Wigmore says, if made after transfer of title, they are not admissible, and (2) to admit them would open the door to fraud and violate the very principle on which the general rule as to declarations in derogation of the title made after transfer of the title are excluded, that is to prevent just such frauds.

Such declarations, if admitted, could not be considered, as that would be to permit a grantor to defraud his grantee by depriving him of a portion and, if a portion, why not the whole of the property he had conveyed possibly at a large price. Since they could not be considered, it would be idle to admit such declarations.

When objection was made to Marcos C. de Baca testifying to declarations by Prudencio (rec., p. 362), the Court asked " Can you estop a witness ? " There is no question of estopping a witness but of preventing him from testifying to statements made by persons who had no right to make them and which could not be considered, and from testifying to matter that is inadmissible. Otherwise it would be necessary to let

him testify and then move to strike it out, which, in case there was a jury, might be fatal, since once heard the impression could not be removed from the minds of the jury.

Under the foregoing, the declarations testified to by Marcos C. de Baca as made to him by his father, Tomas Cabeza de Baca, and his great uncles Prudencio, Domingo and Manuel Baca, as to there having been an Antonio Baca, who was the oldest son of Luis Maria Baca, or as to his having married, or left children, were inadmissible and the objection made should have been sustained.

As to the First Ground of Objection, it was Not Shown that the Alleged Declarations of Tomas, Prudencio, Domingo and Manuel were made ante litem motam.

The rule as to the admissibility of declarations in regard to pedigree was very clearly stated by the Court below as follows (rec., p. 337): the declarant must be dead or his testimony unobtainable; the declarant must be related to the family, to which the declarations relate, by blood or marriage; and the declaration must have been made *ante litem motam* (*Fulkerson v. Holmes*, 117 U. S., 389; *Aalholm v. People*, 211 N. Y., 406, 412; *Young v. Schulenberg*, 165 N. Y., 385; *Mobley v. Pierce*, 87 S. E., 24).

It appears from the petition of the executor of Baca (rec., p. 448), as well as from the testimony of Marcos (rec., pp. 338, 340), that as early as 1828 there was a question as to whether the husband of Garviso, who Marcos says was Antonio, was an heir of Luis Maria Baca entitled to inherit. This controversy apparently existed in the early part of 1875 (rec., p. 330) when partition suits were brought to partition Location No. 1 and the Ojo del Espiritu Santo grant, in which the question was who were the heirs of Luis Maria Baca (rec., p. 352).

The testimony of Marcos as to the time of the declarations is based solely on memory. He made no claim that any of the lists had dates. In fact it appears they could not have had dates in view of Marcos' testimony that the list he had with him was made between 1880 and 1884, an interval of four years (rec., p. 373). The witness first fixes the time whan he commenced his study as to the heirs in 1875 (rec., p. 330) about the time of the suits. His testimony as to the time of his conversation with Domingo is that it was in 1893 or 1894 (rec., p. 359) and he is very uncertain as to the time of his conversation with Manuel saying first that it was not prior to 1875, then that he did have a conversation with him in 1875 and finally, when asked by his counsel whether it was before the bringing of the partition suits said it was and, when urged to say how long before, says it may have been six months and it may have been a year (rec., p. 358) which, if the suits were brought as he testified early in 1875 (rec., p. 347) would contradict his previous testimony that he had no conversation with Manuel prior to 1875 (rec., p. 358).

From the foregoing it certainly can not be said that it appears that the declarations were made *ante litem motam.* The truth probably is that, in 1875 about the time the suits were brought Marcos C. de Baca who was then assisting his father (rec., p. 371), may have looked up the facts as to the heirs of Luis Maria Baca, as he testified (rec., p. 330), in which case the declarations would be inadmissible as not made *ante litem motam* (*Mobley v. Pierce*, 87 S. E., 24 ; *Fulkerson v. Holmes*, 117 U. S., 389 ; *Aalholm v. People*, 211 N. Y., 406, 412 ; *Young v. Schulenberg*, 165 N. Y., 385).

But it is immaterial whether the statements were made in 1873 or in 1875. It appears that there was a controversy in 1827 or 1828 as to who were the heirs of Luis Maria Baca. If partition suits to divide Baca Float No. 1 and the Ojo Espiritu Santo grant were begun early in 1875, it is entirely

probable that preparations for bringing such suits were begun as early or earlier than 1873 and that the question, which made such suits necessary, as that as to the heirs of Luis Maria Baca, were discussed even before preparations were begun.

The Testimony of Marcos C. de Baca is not Entitled to any Credence.

Marcos was an interested witness, interested to sustain the contention as to Antonio. He had been paid by Wise (rec., p. 372); and, having procured deeds to himself from the "reputed" heirs of Antonio (rec., p. 372) he was interested to prove that they were heirs and to sustain his representations in his deed to the Wises (rec., p. 261) that the persons from whom he had derived the title were the heirs of Antonio. Marcos subsequently conveyed to the defendants below Joseph E. Wise and Jesse H. Wise (rec., p. 261) whatever title he got under these deeds.

As said in *Jones on Evidence*, vol. 2, sec. 317:—

> "Moreover it is evident that prejudiced and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and they can do so with comparative impunity from exposure or punishment. Evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency."

And as said by Sir John Romilly in a leading English case reported in Book 52 of English Reprint, 382:

> "slight reliance is to be paid to the declarations of deceased persons, said to have been made before, but remembered after the cause of litigation has arisen."

At the time that Wise went to New Mexico and met Marcos the litigation in the District of Columbia was nearing its final stage and all the parties in interest knew that, as soon as the Supreme Court had rendered its decision, litigation would be begun in the local courts. It was consequently after the commencement of litigation that Marcos called to memory the statements which are so important to his version of the case.

When a witness testifies to declarations made by deceased persons, as Marcos C. de Baca does here, and especially when the declarations are said to have been made so long ago and no reason appears why the witness should remember them at this time except for the purposes of this suit, the testimony of such witness must be free of every vestige of doubt, which is the reverse of the case here as to the testimony of Marcos.

Marcos C. de Baca's testimony is inherently improbable, inconsistent and contradictory; is improbable in the light of human experience; is inconsistent with other evidence in the case and was given in a manner which showed the willingness of the the witness to testify to whatever was wanted of him to support his side of the case.

It is improbable that a youth of sixteen (rec., pp. 347, 350) in his circumstances would be likely to conceive, much less to carry out, the idea of making a family tree of the Baca family. It is improbable that such a youth having been told by his father all about the family (rec., p. 347) would think it necessary to apply to his great uncles Prudencio, Manuel and Domingo to give him further information. It is improbable that his father or either of his great uncles would have made declarations within two years after executing the deed of May 30, 1871, in which they solemnly covenanted that the grantors were all the heirs of Luis Maria Baca, that there was another heir. It is improbable that Marcos, who knew of the will, the petition of the executor and the order of reference, did not know what the result of the hearing before the Alcalde was (rec., p. 377), and

would not have testified what it was if it had been favorable. It is improbable that Marcos, who, according to his testimony was for twenty years working on this subject and knew of the partition suits and procured information as to the heirs for use in them, did not examine the records in those suits or know what the outcome was in regard to whether or not Antonio was found to have been an heir (rec., p. 377). It is improbable that Marcos, himself a lawyer, did not inform his relatives of their rights. It was only when Wise came to him with actual money in his hands that he talked about the " reputed " heirs of Antonio.

It is not to be believed that the witness' father, who had acted as agent since 1869 for the heirs, who was himself a grandson of Luis Maria Baca, who employed John S. Watts and furnished him the information as to the heirs of Luis Maria Baca on which Watts acted, should not have caused Antonio or his heirs to be included in the list of heirs in either of the petitions presented to the surveyor general ; or that the witness' father, or his great uncles would have joined in the deeds of May 1, 1864, and May 30, 1871, which purported to convey all the interest of the heirs, not in one but in several of the grants, and not have observed and corrected the omission of Antonio's interest, if he had any, especially when in the latter deed their attention was expressly directed to it by the covenant that the grantors were the sole lawful heirs of Luis Maria Baca.

The witness' willingness to testify as of his own knowledge to matters which he could not have known of his own knowledge and which he was forced to admit he only knew from hearsay, and the failure to produce a single one of the alleged heirs of Antonio who made the deeds to Marcos to corroborate him to the slight extent of showing who their fathers and mothers were, added to the other defects, renders his testimony unbelievable and makes it such that under the decisions referred to the alleged declarations are of no value.

There is no competent evidence at all that the persons who executed the deeds to Marcos C. de Baca were the lawful descendants of the alleged Antonio and entitled to inherit from him, no evidence of the marriage of parents or birth of children in lawful wedlock.

The case was closed on April 1, 1915, and the Court caused a minute to be made of that fact and that the defendants below, Wises, were allowed twenty days within which to file a brief as to Antonio and the other parties twenty days thereafter to reply, the matter that is as to Antonio, being taken under advisement (rec., p. 433).

Thereafter and after the forty days had expired and on August 12, 1915, the attorney for the defendants below, Wises, filed in the clerk's office at Tucson, and gave notice of, a motion to reopen the case to admit certain certified copies of depositions filed in one of the partition suits in New Mexico.

This motion was properly denied for two reasons: *First* the attorney had an uncertified copy of these papers at the hearing and had permission to file them and procure certified copies later but did not avail himself of such permission (rec., p.) and *second* such certified copies were inadmissible (Rollins v. Wicker, 70 S. E., 934; 154 N. C., 559, 562), where the Court said

> "the testimony of such persons (referring to declarants) given in a former trial involving the same questions as in the present case is incompetent."

Later the defendants below, Wises, sought to introduce the certified copies of the depositions above referred to and, on objection, permission was refused. For the reasons above stated this was a correct ruling.

Another reason why the certified copies of depositions should not have been allowed to be introduced after the hearing was that it meant a reopening of the whole case as the other parties would necessarily have had to rebut by offering other portions of the record in the partition suits or otherwise.

When the Deeds to Marcos C. de Baca From the Alleged Heirs of Antonio and the Deeds to the Defendants Below Joseph E. Wise and Margaret W. Wise Were Offered in Evidence They Were seasonably objected to.

This objection should have been sustained for the reasons given in this brief why such deeds were incompetent, irrelevant and immaterial, and because it did not appear that the grantors in the deeds to Marcos C. de Baca had any title to convey.

Summary.

It is confidently submitted that there is an entire failure on the part of the defendants below, Joseph E. Wise and Margaret W. Wise, to sustain the burden of proof which was on them to establish that there was an heir of Luis Maria Baca, named Antonio, *entitled to inherit*, or that the persons who conveyed to Marcos C. de Baca were the lawful descendants of such Antonio and entitled to inherit from him.

More than this there is no competent evidence to prove that there was an heir named Antonio or that he left lawful descendants entitled to inherit.

There is in the omission from the several petitions presented to the surveyor general of any reference to the heirship of Antonio or his descendants and in the similar omission in the two deeds to Watts, in one of which the grantors, brothers and sisters and other near relatives of the alleged Antonio, covenant

that the grantors are the sole lawful heirs of Luis Maria Baca, taken in connection with the allegations in the petition of the executor that the deceased son—said to be the alleged Antonio —was not an heir entitled to inherit on account of having been advanced his share of the estate, very strong, suggestive and persuasive evidence that there was no heir, named Antonio, entitled to inherit.

Certainly the overwhelming weight of the evidence is against the claim, so that the judgment of the court below as to Antonio was at least against the weight of the evidence.

II.

The title involved in this suit is derived under the Act of Congress of June 21, 1860, and in the grant under the Sixth Section of that Act neither Antonio nor his heirs could have had any interest.

The grant made by the sixth section of the Act of June 21, 1860, was in exchange for the rights of the claimant heirs of Luis Maria Baca to the Las Vegas grant.

Congress had full power under the Treaty under which the territory of which this land formed a part was acquired from Mexico, to prescribe the mode of ascertaining the validity of claims of title under Spanish and Mexican grants, and in case such mode was not complied with, to provide for the forfeiture of such claims.

Barker v. Harvey, 181 U. S., 481, 486, 487;
Ainsa v. United States, 161 U. S., 208, 222;
Astiazaran v. Mining Co., 148 U. S., 80;
Botiller v. Dominguez, 130 U. S., 238;
Tameling v. U. S. Freehold Co., 93 U. S., 644, 661, 662;
U. S. v. Repentigny, 72 U. S., 217, 268.

Congress exercised this power and performed this duty by the passage of the Act of July 22, 1854 (10 Stat., 308, 309), in regard to lands in New Mexico by providing among other things :

> " SEC. 8. And Be It Further Enacted, that it shall be the duty of the Surveyor General under such instructions as may be given by the Secretary of the Interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico ; and for this purpose may issue notices, summon witnesses, administer oaths and perform all other necessary acts in the premises. He shall make a full report of all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo Eighteen hundred and forty-eight, defining the various kinds of title with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States ; and shall also make a report in regard to all the pueblos existing in the territory showing the extent and locality of each, stating the number of inhabitants of said pueblos respectively and the nature of their title to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior ; which report shall be laid before Congress for such action thereon as may be deemed just and proper with a view to the confirmation of *bona fide* grants and to give full effect to the Treaty of Eighteen hundred and forty-eight between the United States and Mexico ; and until final action by Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government and shall not be subject to donations pursuant to the provisions of this Act."
>
> " SEC. 9. And Be It Further Enacted That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for the full carrying into effect of the several provisions of this Act."

Pursuant to the provisions of the foregoing Act the Secretary of the Interior issued regulations on August 25, 1854 (Public Domain, 394–398) which read in part as follows:

> " Your first session will be held at Santa Fe. * * * You will commence your session by giving proper public notice of the same, in a newspaper of the largest circulation, in the English and Spanish languages, will make known your readiness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require the claimant in every case—and give public notice to that effect—to file a written notice setting forth the *name of the present claimant;* name of the original claimant; nature of the claim, whether inchoate or perfect; its date; from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted; quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claims, and to show a *transfer of right from the original grantee to the present claimant.*"

Due notice by advertisement was given, requiring claimants to present their claims stating the source and chaim of their title, etc. (Public Domain, p. 404). In accordance with such notice certain persons appeared as claimants for the Las Vegas grant.

Pursuant to the regulations and in accordance with the provisions of the Act the Surveyor General under date of December 18, 1858, made a report as to the Las Vegas grant, accompanied by the documents upon which such report was based (36th Cong., 1st Sess. H. R. Ex. Doc. No. 14, Claim No. 20).

The petition in that proceeding (Santa Cruz Development Co., Ex. 1, rec., p. 403) was filed by John S. Watts as attorney

for the petitioners, who are stated to be "the surviving heirs at law of one Luis Cabeza de Baca, deceased," and whose names are set out in detail, neither Antonio Baca nor his descendants.

In support of the petition certain testimony was taken before the Surveyor General (Santa Cruz Development Co., Ex. 2, rec., p. 405), by which it appears that the witnesses knew the sons and grandchildren of Luis Cabeza de Baca, and that those named in the petition were all of the surviving heirs of Baca.

In accordance with the provisions of the Act of July 22, 1854 (*supra*), the report of the Surveyor General, to which reference was made as above stated, found that the grant to Luis Maria Baca was valid and prior to a grant of the same land to the town of Las Vegas, which he also found valid.

The Senate Committee on Private Land Claims on May 19, 1860 (Rep. Com. No. 228, Sen. 36th Cong. 1st Sess.), reported that the grant to Baca "was in fee and is a genuine and valid title;" that the heirs of Baca had expressed a willingness to waive their older title in favor of the settlers under the grant to the town of Las Vegas and recommended that Congress so legislate as to accomplish that purpose.

In pursuance of this recommendation Congress, by an Act entitled "An Act to Confirm Certain Private Land Claims in the Territory of New Mexico," approved June 21, 1860 (12 Stat., 71, 72), enacted among other things:

> "SEC. 3. And Be It Further Enacted that the private land claims in the Territory of New Mexico as recommended for confirmation by the said Surveyor General in his reports and abstracts marked 'Exhibit A' as communicated to Congress by the Secretary of the Interior in his letter dated 3d of February, 1862, and numbered from 20 to 38 both inclusive, be and the same are hereby confirmed with the exception of the claim numbered 26 in the name of Juan Vigil, No. 26, which claim is not confirmed.
>
> SEC. 6. And Be it Further Enacted that it shall be

> lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the Town of Las Begas, to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them; *provided, however*, that the right hereby granted to the said heirs of Baca shall continue in force during three years from the passage of this Act and no longer."

The Act was approved June 21, 1860, so that there is no question about the time of passage.

The question presented on this appeal, is whether under the foregoing facts—assuming that there was such a person as Antonio Baca—that he was the son of Luis Maria Baca ; that he died before his father ; that he left a son—Juan Manuel—who was heir to his interests in the original Las Vegas grant to Luis Maria Baca, did either Antonio Baca or his said son Juan Manuel have any interest in the lands selected and located under the Sixth Section of the Act of Congress of June 21, 1860, which are the lands in question here ?

It is settled law that in considering this question all of the proceedings, commencing with the presentation of the petition to the Surveyor General and ending with the Act of Congress, must be considered as one act.

> *Landis v. Brant*, 10 How. (U. S.), 348, 372.
> *Jones, Rec'r. v. St. Louis Land & Cattle Co.*, 232 U. S., 355,

in which last case the Court said (pp. 360, 361) :

> " The proceedings therefore for the confirmation of titles derived from Mexico commenced with the Surveyor General and were consummated by the confirming

> Act. * * * the petition to him as the commencement of the proceedings which necessarily involved the validity of the grant from the Mexican government. Congress, however, constituted itself the tribunal for the ultimate decision of the validity or invalidity of the claim, as of course it might do in discharge of the treaty obligations * * *. The confirmation therefore can not be disassociated from what preceded it."

As has been shown, Congress by the third section of the Act of June 21, 1860, confirmed claim No. 20, which included both the claim of the heirs of Baca and of the town of Las Vegas.

In *Maese v. Herman*, 183 U. S., 581, the Supreme Court held that, in view of the waiver of their prior right by the heirs of Baca, who presented their claim to the Las Vegas grant to the Surveyor General, the third section of the Act confirmed the grant to the town of Las Vegas not to the heirs of Baca in view of the sixth section, saying :

> " Congress accommodated the dispute (to the title to said land) by a magnificent donation of land to the heirs of Baca and confirmed the original grant to the town."

The grant by the sixth section of the Act of June 21, 1860, was therefore a grant *de novo* by Congress of a part of the public domain to the heirs of Baca " who make claim to the said tract of land as is claimed by the town of Las Vegas."

The power of Congress to make a direct grant of public lands, and that in such case the grant is as effective as if by patent or by deed, is too well established to require the citation of authorities. Here the only difference between this and the ordinary direct grant was that the grant was on condition that the land should be selected within three years, which condition was complied with with regard to the land here in question.

In *Tameling v. U. S. Freehold Co.*, 93 U. S., 644, it was held that the action of Congress confirming a private land claim in New Mexico "as recommended for confirmation by the Surveyor General" of that territory, was not subject to judicial review; nor is the action of Congress in making grants of public land the subject of judicial review, though it may be necessary for the Courts, as here, to decide to whom the grant is made.

The words "claim" and "claimant" used in regard to grants of land made by foreign governments in territory subsequently ceded to the United States, which required recognition and confirmation by that government, have obtained a fixed interpretation by the decisions of the courts of the United States, and by them it has been decided uniformly that in such cases the confirmation was made to the person claiming the grant before the constituted tribunal, and, in every event, the title, if confirmed, inured to him in his character of claimant.

The question, as the Supreme Court says in *Connoyer v. Shaeffer*, 22 Wall., 260, "Has been settled so long that it has become a rule of property, and it would produce infinite mischief to disturb it." The language of the Supreme Court as to whom the confirmation of the claim inured is decisive, the court saying in *Bissel v. Penrose*, 8 How., 317, 338:

> "This is the view taken of the question in Strother v. Lucas, on each occasion where it was before this court (6 Pet., 772; 12 Pet., 458). It was there held that the confirmation was to be deemed in favor of the person claiming it."

This question again came before the Supreme Court in *Connoyer v. Shaeffer*, 22 Wall., 254, and as this case is finally decisive, and, in our opinion, determinative in this case, the opinion of the Court is given *in extenso*.

This case was one arising under proceedings before the

board of Commissioners appointed under the Act of March 2, 1805, for ascertaining and adjusting claims to lands embraced in the Louisiana purchase, and Mr. Justice DAVIS, on page 260, says :

> " The substantial point of inquiry presented in this case is, to whom did the confirmation inure ?
>
> " The question which we are called upon to consider is not a new one. If it were it would certainly not be free from difficulty. It has, however, been settled so long that it has become a rule of property, and it would produce infinite mischief to disturb it. Two classes of claims were presented to the Commissioners—one where the claimant exhibited with his claim evidence of a derivative title from the concedee, the other where he only produced the original concession without attempting to show his connection with it.
>
> " In the latter class the claim, if confirmed, has been held to have the effect of a confirmation to the legal representatives of the person to whom the original concession was made. This ruling proceeds upon the theory that the Commissioners passed upon nothing but the merits of ths original concession, having no opportunity to pass upon the validity of anything else. Of this class, where no evidence of derivative title at all was filed with the concession is the case of Hogan v. Page, 2 Wall., 605. But when the claimant presented before the board, besides the original title, evidence of derivative title, it has been held that the Commissioners decided upon both, and that the confirmation operated as a grant to the claimant, *although his name was omitted in the form of confirmation.* This was expressly ruled in Bissel v. Penrose, 8 How., 317. The claim there was confirmed to Benito, Antoine, Hypolite, Joseph, and Pierre Vaquez, or their legal representatives, according to the concession. Rudolph Tillier presented the claim for confirmation and produced the concession, with written evidence of his title, which would appear to have been imperfect. It was argued there, as here, that the act of 1836 confirms only the

Spanish concession in the abstract, but the court held otherwise, and decided that the title was confirmed to Tillier, the assignee, as claimant" (italics ours).

The Court continues on page 262:

"The same point was again presented to the Supreme Court of Missouri in Carpenter v. Rannells, 45 Mo., 584, with the same result.

"The record, in that case shows that James Bankson, as assignee of John Butler, under an executory contract, claimed the land, and produced to the board evidence upon which a confirmation was granted. The judgment of confirmation, however, was to John Butler, or his legal representatives, but the Court held, on the authority of Bissel v. Penrose and Boone v. Moore, 14 Mo., 420, that the legal effect of this confirmation was to vest the title in Bankson. The principles in this case are examined and adhered to in the case of the present plaintiffs against Labeaume's heirs, reported in 45 Mo., 139.

"The case of Carpenter v. Rannells was brought to this Court (19 Wall., 138), and it was held substantially, that Bankson, having presented the claim and filed his paper title with it, the confirmation inured to him, and that *no other representative of Butler, whether hereditary or by contract, had any right, legal or equitable, to the premises in controversy*" (italics ours).

(p. 263):

"After the lapse of more than sixty years Labeaume's title is disputed in behalf of persons who never appeared before the Commissioners with any claim of their own."

In the Los Trigos grant, confirmed as claim No. 8 by the Act of June 21, 1860, the surveyor general in his opinion says (36 Cong., 1st Sess., H. R. Report No. 321, p. 154):

"The instructions to this office provide that when a claim may be presented by a party as 'present

> claimant', in right of another, and where the deraignment of title is not complete, the entry and decision should be in favor of the legal representatives of the original grantee. * * * The grant is, therefore, confirmed to the legal representatives of Francisco Trujillo, Diego Padilla and Bartolome Marquez."

In the Preston Beck grant, confirmed by the Act of June 21, 1860 (12 Stat., 71), as claim No. 1, the Supreme Court, speaking of the surveyor general's report, said in *Stoneroad v. Stoneroad*, 158 U. S., at page 247 :

> "In his recommendation to Congress, however, which is practically the decretal part of his opinion, he says : 'The Congress of the United States is respectfully recommended to cause a patent to be issued to the said Preston Beck, Jr., by the proper department, and cause the same to be surveyed.' It was this recommendation which was acted upon by Congress."

The language of the confirmatory act is :

> "That the private land claims in the Territory of New Mexico as recommended for confirmation by the surveyor general of that territory and in his letter to the commissioner of the general land office of the 12th of January eighteen hundred and fifty-eight designated as numbers one, * * * be and the same hereby are confirmed."

In the Sangre de Christo grant, confirmed by Congress by the Act of June 21, 1860, as claim No. 4, the surveyor general in his report says (36 Cong. 1st Sess., H. R. Rep., No. 321, on page 14) :

> "Narciso Beaubien, one of the grantees, was killed at the massacre of Taos in the year 1847, and, dying without issue, his father, Charles Beaubien, the present claimant, became the heir of one undivided half of the land granted, and purchased the remaining undivided

half from Joseph Pley, administrator of the estate of Stephen L. Lee, who was killed at the same time and place as Narcisco Beaubien."

He further states :

"It is the opinion of this office that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition—the grant is therefore approved by this office," &c.

In the Bracito grant, confirmed by the Act of June 21, 1860, as claim No. 6, the surveyor general, says (36 Cong., 1st Sess., H. R. Report No. 321, on page 34) :

"The testimony also shows that a grant was made to Juan Antonio Garcia in the year 1822 or 1823."
* * *

"The claimants have not presented any testimony to prove that the present claimants are the legal heirs and assignees of Juan Antonio Garcia, deceased, * * * and as no claim of title is presented to show that the present claimants are the legal heirs and assigns of said Juan Antonio Garcia, it is the opinion of this office that the grant should be confirmed to Juan Antonio Garcia alone."

In the Los Esteros grant, confirmed by the Act of June 21, 1860, as No. 16 (same Pub. Doc., p. 268), the surveyor general, on page 268, after stating the grant to Pedro José Perea, says :

"On the 15th day of December, 1856, Pedro José Perea executed a deed of gift of the aforementioned land to José Leandro Perea, his son, the present claimant. * * * The grant is therefore confirmed to José Leandro Perea, and transmitted to the proper department for the action of Congress in the premises."

In the Caspar Ortiz claim, confirmed by the Act of June 21, 1860, as claim No. 31 (36th Cong., 1st Sess., H. R. Ex. Doc. No. 14), the surveyor general, on page 179, makes the following report :

> " Gaspar Ortiz claims a title to a tract of land by virtue of an agreement made by Gaspar Domingo de Mendoza on the 25th September, 1789, to Vicente Duran de Armijo, and possession given by him on the fifth of October of the same year by Juan Garcia de Mora, senior justice and war captain of the town of Santa Cruz. It has been proven in evidence by the present claimant that his grandfather Gaspar Ortiz, purchased the land claimed from Vicente Duran de Amijo, and that himself and his heirs have occupied the land continuously from the year 1789 up to the present time, and that the land was duly conveyed by an instrument in writing to the said Gaspar Ortiz, senior, and that the document has been lost or mislaid in such a manner as to prevent its being produced. The land has been quietly and peaceably held by the claimant and his ancestors, and is believed to be a good and valid grant; but as the chain of title is from the original grantee to the present claimant, the claim being inchoate, it is approved to the legal representatives of Vicente Duran de Armijo, and ordered to be transmitted to Congress for its action in the premises."

In the Valverde grant, confirmed by the Act of June 21, 1860, as claim No. 33 (same Pub. Doc.) it appears that the claimants were Manuel Armendaris, Henrique Armendaris, Miguel Armendaris, Antonio Armendaris and Rodrigo Garcia, father and guardian of the infant children of Beline Armendaris, deceased, being the only surviving heirs and legal representatives of the said Pedro Armendaris, deceased. On page 220 the surveyor general reports :

> " The above grant was made according to the well-established usages and customs of the country at the

time. The grantee has held possession from the time grant was made up to the present day, and no one having appeared to show a better title thereto, the original and subsequent additional grant are believed to be good and valid; they are therefore approved to the legal representatives of Pedro Armendaris, and ordered," &c.

In the claim of Ramon Vigil, confirmed by the Act of June 21, 1860, as claim No. 38, a petition for confirmation was filed by Ramon Vigil, as claimant (Same Pub. Doc., p. 249). The surveyor general, on page 253, made the following report:

> " Pedro Sanchez, a resident of Santa Cruz de la Canada, made application to Don Gaspar Domingo de Mendoza for a tract of land in what is now the county of Rio Arriba and contained within the boundaries therein mentioned. On the 20th day of March, 1742, Governor Mendoza granted him the land asked for, and ordered the chief justice of the jurisdiction of Canada to place him in possession, which was done on the 28th day of the same month.
>
> " The claimant, although he referred to other documents in his petition, has never filed them, and consequently can show no transfer of title from the original grantee to himself.
>
> " The grant above referred to, and acted upon by this office, is the original filed by the claimant, and is believed to be genuine.
>
> " The case has been advertised. The parties are and have been in quiet and peaceable possession of the land from time immemorial. It is therefore deemed to be a good and valid one, and is approved to the legal representatives of Pedro Sanchez."

From the above instances which have been given of the mode of procedure by the surveyor general regarding claims to land presented to him for adjudication and confirmation in the first instance, the results of which procedure were to be

by him transmitted to Congress for its final action on his reports on such claims, which, if confirmed, were so confirmed "as recommended for confirmation by the surveyor general," it is obvious, that that official had, under the act of 1854, and the regulations issued thereunder by the Land Office, and the legislative construction given to that Act and those regulations by the confirmatory Act of June 21, 1860, and the judicial construction in the case of *Tameling v. U. S. Freehold Co., supra*, the authority to report not only on the validity of the original grant, but to decide who was the claimant to whom the grant was to be confirmed by Congress, and to whom a patent was to be issued. His decisions on these matters, if confirmed by Congress, were final, and not subject to review by the Courts.

As the Supreme Court says in *Tameling v. U. S. Freehold Co.*, 93 U. S., 662:

> "It is obviously not the duty of this Court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant."

If the claim of title of the Baca heirs to the grant of Las Vegas Grandes had been recommended for confirmation by the surveyor general, and had been confirmed by Congress, then, under the provisions of the Act of 1854, and the regulations issued thereunder, the procedure of the surveyor general as shown in the foregoing instances, and the above cited decisions of the Supreme Court, that confirmation must have been to the heirs of Luis Maria Baca who made claim before the surveyor general, or, in the event the judgment of confirmation had been to Luis Maria Baca or his legal representatives the title must have inured to those heirs who made claim. The making claim was an essential and determinative fact in the proceedings.

The procedure of the surveyor general under the Act of

1854, and the regulations issued thereunder by the Land Office, was in harmony with the decisions of the Supreme Court hereinbefore cited. Where a claim was presented to him by a claimant other than the original grantee or his legal representatives who produced the papers of original grant and those of transfer to himself; or where, as in this case, certain of the heirs of the original grantee produced the original grant papers and the proof of their exclusive derivative title as the sole male heirs of the grantee, the confirmation was to the claimant or claimants, otherwise it was to the legal representatives of the original grantee. The surveyor general passed not only upon the validity of the grant but the title of the claimant, and if the grant was confirmed by Congress, "as recommended for confirmation by the surveyor general," as was done in this case, such action was not subject to review by the courts (*Tameling v. U. S. Freehold Co., supra*).

The whole purpose of Congress in enacting the Act of July 22, 1854, to provide a mode in which titles in New Mexico under alleged Spanish or Mexican Grants might be settled would be defeated if when certain persons representing themselves to be the sole surviving heirs of a grantee had applied to the surveyor general and by him been found to be entitled to the grant; and Congress acting upon his finding had not confirmed the original grant but accepting waiver of the original grant from the claimant heirs had made a grant *de novo* to them and they had disposed of the land to *bona fide* purchasers for value without notice, other heirs of the original grantee could claim an interest in the grant made by Congress in lieu of the original grant.

In other words, when Congress passed the sixth section of the Act of June 21, 1860, it is evident from the language that they had in mind the persons who had presented their claim to the surveyor general and who he had found to be the holders of a superior grant to the town of Las Vegas.

Certainly no claim can be made that in making the selection and location of June 17, 1863, John S. Watts acted for or had any authority to act for the alleged Antonio Baca or his descendants.

As has been above stated in determining to whom the grant was made by the sixth section of the Act of June 21, 1860, all of the proceedings commencing with the petition to the surveyor general and ending with the act of confirmation must be considered.

Further than this the attention of the Court is called to the fact that the sixth section of the Act of June 21, 1860, in its present form was inserted in the Senate on the report of a Committee of which Senator Judah P. Benjamin was Chairman. Mr. Benjamin was a lawyer of international reputation and naturally was fully aware of the legal difficulties attending a grant to the heirs of a deceased person in such a case, and it is fair to assume that by the limitation to the heirs "who make claim to the same land as is claimed by the town of Las Vegas" he meant to relieve the Land Department of the difficult task of determining who were the heirs and to make the grant to specific persons, since *id certum est quid certum reddi potest.*

III.

The representatives of Antonio Baca can not in this case or in this manner have their claim adjudicated. The most they can claim, if Antonio had any interest in the Las Vegas grant, would be against the other heirs of Baca for a portion of the proceeds of sale received by such other heirs.

If a patent issues to the wrong person, the only remedy of the rightful claimant is a suit in equity against the original patentee to impress a trust on the land if unsold or to reach the proceeds if the land has been sold.

Marquis v. Frisbie, 101 U. S., 473, 475.
Johnson v. Tousley, 13 Wall., 72.
Shepley v. Cowan, 91 U. S., 330.

So here if Antonio had any interest in the Las Vegas grant the only remedy of his descendants is against the other heirs of Luis Maria Baca.

IV.

Neither Antonio nor his heirs had any interest in the Las Vegas grant.

This case does not involve the Las Vegas Grant, nor is it affected in any way by that grant. The question in this case relates solely to the grant by Congress of a portion of the public domain by the sixth section of the Act of June 21, 1860. The only part the Las Vegas grant plays in it is that

Congress, in consideration of the surrender of whatever rights the claimant heirs of Luis Maria Baca had to the Las Vegas grant, granted them the right to locate an equal quantity of vacant land not mineral in New Mexico.

But even if it was a question of the Las Vegas grant neither Antonio nor his heirs would have had any interest in it.

In *Rio Arriba Co. v. United States*, 167 U. S., 298, with regard to a similar grant to that of Las Vegas in New Mexico, the Court said (p. 307) :

> " Reference is indeed made to the use of the lands within the outboundaries for pastures and watering places but this does not put them out of the class of public lands, and, whatever equities might exist, no title was conveyed."

And (p. 308) :

> " We have just held in *United States v. Sandoval*, *ante*, 278, that as to all the unallotted lands within the exterior boundaries as in this instance title remained in the government for such disposition as it might see proper to make."
>
> See, also, *United States v. Santa Fe*, 165 U. S., 175.

There is no evidence that any portion of the Las Vegas grant was ever set apart to Antonio or any one as representing him ; and under the foregoing decisions, therefore, so far as Antonio was concerned, the whole of the grant remained public domain.

V.

For the foregoing reasons it is respectfully submitted that the decree of the Court below should be reversed so far as it recognizes the title of Joseph E. Wise and Margaret W. Wise to an undivided one-thirty-eighth interest each in said land.

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
Solicitors for Watts and Davis;
JOHN H. CAMPBELL,
Solicitor for Bouldins;
G. H. BREVILLIER,
Solicitor for Santa Cruz Development Company.

HERBERT NOBLE,
Of Counsel for Watts & Davis.
JOSEPH W. BAILEY,
WELDON M. BAILEY,
Of Counsel for Bouldins.
JAMES W. VROOM,
Of Counsel for Santa Cruz Development Co.